

I. INTRODUCTION

Criminal Conduct Undermines Public Confidence

The public's confidence in the banking system is undermined when bank officials abuse their positions or engage in fraudulent and dishonest conduct. Fraud and embezzlement losses harm individual banks and, through fidelity insurance premiums, raise overall costs in the banking system. Studies have shown that insider abuse and fraud are major contributing factors in about one-third of bank failures. When this occurs, the FDIC's Insurance Fund can suffer significant losses. Bank Management is Responsible for Preventing and Detecting Fraud and Insider Abuse

Despite the efforts of federal agencies to detect, investigate and prosecute bank fraud, the primary responsibility to prevent fraud and insider abuse rests squarely on the shoulders of bank management. To properly execute their fiduciary duties, bank managements must implement internal controls and other safeguards to prevent fraud and theft and deny insiders the opportunity to abuse their positions. But, even the best safeguards can be circumvented; therefore, bank systems also must be designed to detect crimes. Once detected, apparent criminal violations must be reported promptly to the appropriate law enforcement agencies and to the FDIC. Part 353 of the FDIC Rules and Regulations requires banks to report apparent crimes to the United States Attorney, the FBI and the FDIC within 30 days of their discovery on a standard form, the Interagency Criminal Referral Form.

Bank management should seek to create a professional environment that embodies the highest ethical standards. A Code of Conduct or Code of Ethics should govern each bank officer's dealings and transactions with outside parties. The Code should provide guidance for the receipt of gifts and gratuities and delineate acceptable business practices.

The Examiner's Role

Examiners are responsible for evaluating the bank's internal controls and management systems. During an examination, the examiner must be alert for irregular or unusual activity indicating that an apparent crime was committed or an insider benefited personally from bank business. Conduct that cannot be explained

satisfactorily should be investigated thoroughly. Where senior management is suspected of possible criminal activity, the examiner must investigate the circumstances and facts surrounding the situation in enough detail to prepare accurately a criminal referral and, if necessary, gather the facts to support an administrative removal action under Section 8 of the Federal Deposit Insurance Act. The Bank Fraud and Insider Abuse Section contains warning signs of fraud and investigative alternatives. It should be used as a reference during examinations to identify unusual or abusive conduct by bank officials and customers.

Disclosure of Confidential Information to Law Enforcement Authorities

An examiner may disclose confidential information obtained during the course of an examination to law enforcement authorities after obtaining permission from the Regional Director, or his designee, pursuant to Part 309 of the FDIC Rules and Regulations. Details relating to customer financial records can be discussed freely with law enforcement officials after a Regional Office official has certified that the customer records are relevant to a possible violation of criminal law and were obtained in the exercise of the FDIC's supervisory or regulatory functions. Regional Counsels have the delegated authority under Part 309 to authorize an examiner to appear and testify before the grand jury or at a criminal trial. Refer to "Examiner Assistance to Federal Law Enforcement Authorities" (paragraph V. in this section).

This section provides a discussion and explanation of Part 353 of the FDIC Rules and Regulations requiring banks to report crimes against or involving the affairs of the bank to the FDIC and to federal law enforcement agencies. It discusses the cooperative efforts of bank regulators and law enforcement agencies and outlines the federal criminal statutes most likely to be encountered by examiners.

II. INTERAGENCY COOPERATION

The FDIC, the other federal financial institution regulators, the FBI and the Justice Department have pledged in a formal interagency agreement

to cooperate and exchange information where necessary to address criminal conduct affecting insured financial institutions.

Criminal Referrals

Part 353 of the FDIC Rules and Regulations requires banks to report crimes to law enforcement authorities and to the FDIC on the Interagency Criminal Referral Form. This standard form is used by all financial institution regulators and is designed to elicit the type of information deemed most important to the FBI and the Department of Justice in assessing the prosecutive merit of the suspected violations. The written referral should be supplemented by oral presentations and follow-up, all of which helps the FDIC to communicate with federal prosecutors and to assist them where appropriate.

The FDIC is to prepare and make referrals directly to the Justice Department in the following instances: (1) the referral made by the financial institution is deemed inadequate, or (2) the suspected criminal conduct discovered by the FDIC has not been reported by the bank. The fact that a referral form has been sent does not prevent the examiner from making a more detailed written referral and does not preclude referrals by telephone or personal contact in situations where immediate contact with the Justice Department is advisable. Referrals are to be made at an early stage; that is, when the examiner first obtains evidence to support a belief that a crime has been committed. Copies of documents that prove or support the violation should be attached to the referral. Additional supporting documents should be segregated and stored to ensure that they are readily retrievable so they can be provided to law enforcement officials during the investigation or at trial.

Assistance of the Fraud Section

The Fraud Section of the Department of Justice in Washington is available to assist the local prosecutor in handling significant cases. In unusual cases, such as a scheme to defraud several banks located in more than one U.S. Attorney district, the examiner may recommend such assistance in advance of referral to the U.S. Attorneys. Any formal request for assistance, however, is to be made by the Washington Office upon request of the Regional Director. The Fraud Section and FBI Headquarters can assist the U.S.

Attorneys in their evaluation, investigation, and/or prosecution of significant cases and, where appropriate, will coordinate multi-jurisdictional cases. The Fraud Section also may supply prosecutorial staffing to aid the appropriate U. S. Attorney's office.

Communication and Points of Contact

After being authorized by the Regional Director, the examiner may communicate the details of a criminal referral directly to the FBI or the U.S. Attorney's office. Coordination and cooperation during the investigative stage between the local offices of the FDIC and prosecutors and local FBI agents can have a positive effect on the outcome of the prosecution. Local working groups comprised of examiners, prosecutors, FBI agents and other federal investigators have been organized in many areas to resolve communications problems and exchange information to assist in preventing crimes against banks. A list of points of contact within the FBI, U.S. Attorneys' offices, Secret Service, IRS and other investigatory agencies for making criminal referrals, for seeking assistance with investigations, and for resolving any problems with coordination is available from the regional office. The list also identifies individuals in U.S. Attorneys' offices and FBI field offices who are experienced in financial institution crimes.

Parallel Proceedings

The referral of suspected criminal conduct to the Department of Justice does not restrict the FDIC from continuing its own examination or investigation into the same conduct in order to carry out its regulatory responsibilities, unless requested to cease or suspend such activity by the Justice Department in connection with an ongoing criminal investigation or prosecution. Nevertheless, the U.S. Attorney should be kept informed of the progress of any parallel civil investigation with a view toward reaching a cooperative solution, where appropriate. This type of cooperation might lead to a demand for restitution and stipulation to a prohibition from future employment in the banking industry being included in a criminal plea agreement or pre-trial diversion arrangement.

III. CRIMINAL STATUTES

Most of the Federal criminal statutes that an examiner might encounter during a bank examination are contained in Title 18 of the United States Code. These laws are included in the Prentice-Hall volumes with only the major sections discussed below. Unless otherwise indicated, the appropriate federal investigative agency is the FBI.

18 U.S.C. Section 215 - Bank Bribery

Anyone who corruptly gives, offers, or promises anything of value with intent to influence or reward an officer, director, employee, agent or attorney of a financial institution in connection with any business or transaction or any bank official who receives or corruptly solicits such things of value would violate this statute.

As required by this statute, the FDIC and other financial institution regulatory agencies issued guidelines to assist banks in complying with the Bank Bribery Act. The guidelines encourage each state nonmember bank to adopt a code of conduct or policies which should alert bank officials to the Bank Bribery Act, as well as to establish and enforce written policies on acceptable business practices. The code may specify appropriate exceptions to the general prohibition of accepting something of value in connection with bank business that management can defend as not amounting to having a corrupt influence on bank transactions. The code of conduct or policies should stress that a serious threat to the integrity of the bank occurs when its officials become involved in outside business interests or employment that give rise to a conflict of interest, especially should such conflicts evolve into corrupt transactions that are covered under the Bank Bribery Act. Accordingly, banks are encouraged to prohibit bank officials from self-dealing or otherwise trading on their positions with the bank; or accepting from one doing or seeking to do business with the bank, a business opportunity not generally available to the public. In this regard, the bank's code of conduct or policies should require that its officials disclose all potential conflicts of interest, including those in which they have been inadvertently placed due to either business or personal relationships with customers, suppliers, business associates, or competitors of the bank.

18 U.S.C. Section 656 - Theft, Embezzlement, and Misapplication of Funds

This statute prohibits the theft, embezzlement, or misapplication of bank funds, willfully by an officer, director, agent, or employee of a bank, with intent to injure or defraud the bank. Intent can be inferred from the fact of injury or from acts knowingly done in reckless disregard for the interests of the bank.

Three types of activity are proscribed: embezzlement, abstraction, and misapplication. Embezzlement is the unlawful taking of monies by a person or conversion to his or her own use. Embezzlement cannot be charged if funds have been converted to a third party. Abstraction is the wrongful taking or withdrawing of funds with the intent to injure or defraud the bank or some other person without the knowledge or consent of the bank or its board of directors. Misapplication means willful and unlawful misuse of bank funds to the benefit of the wrongdoer or some person other than the bank. Some examples are:

1. Loans granted by a bank officer to fictitious borrowers;
2. Bad loans granted on inadequate or valueless collateral if the loan officer benefited personally or acted in reckless disregard of the bank's interests;
3. Brokered loans where deposits are provided for a fee to fund a loan that is worthless from its inception.

18 U.S.C. Section 709 - False Advertising or Misuse of FDIC Name

Covers false advertising or representations, misuse or unauthorized use of words such as national, reserve, federal deposit, or deposit insurance, or misuse of names such as FDIC, to convey the impression of federal agency affiliation. Violations of this statute should be referred to the U.S. Secret Service.

18 U.S.C. Section 1001 - False Statements or Entries

Generally covers oral or written false statements that are knowingly or willingly made, or concealment of a material fact, for the purpose of influencing a determination of any federal department or agency. It is not necessary to show that the governmental body was actually influenced thereby. The following is an example

of the application of Section 1001: A real estate broker who loaned to purchasers the down payment for obtaining an FHA loan and who submitted to a bank, which acted as agent for the FHA, forms disclosing that the purchaser had paid the down payment in cash, violated Section 1001.

18 U.S.C. Section 1005 - False Entries

Covers false entries and reports or statements, including material omissions, made by an officer, director, agent or employee of an insured bank with intent to injure or defraud the bank, or to deceive the FDIC or other individuals or companies. This section also prohibits any such person from issuing or putting forth in circulation any notes of the bank or making, drawing, issuing, or assigning any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond or other obligation, or mortgage, judgment or decree. The crime may be committed personally or by direction (e.g., an officer directing the making of false entries).

Actions taken by a bank officer or employee to conceal delinquencies, disguise potential lending limit violations, or the recording of securities transactions at values adjusted to hide losses, rather than at the market price, would come under this statute. A false answer to a question on an FDIC Officer's Questionnaire has been held to violate this statute. Entries in minute books are also covered, and the making of unauthorized loans and other unauthorized transactions may come under this statute if the other elements of the statute are met.

18 U.S.C. Section 1007 - Federal Deposit Insurance Corporation Transactions

Covers false statements made for the purpose of influencing an action of the FDIC in any way. This includes willfully over-valuing any security for the purpose of obtaining, extending or renewing a loan and statements made to induce the payment of an insured deposit, the purchase of assets, or the payment of any claim by the FDIC. To establish a violation of this statute, it is not necessary to prove loss or damage to the FDIC caused by the falsification. Violations of this section occur when false statements are made to the FDIC in connection with an application for deposit insurance, notice to acquire control of an

insured state nonmember bank, or other process in which FDIC is required to take action. False or misleading statements made to an FDIC examiner during an examination (e.g., to influence a loan classification) would also be covered. Violations of this statute should be referred to the U.S. Secret Service.

18 U.S.C. Section 1014 - False Statements on a Loan or Credit Application

Covers oral or written false statements or misrepresentations made knowingly on a loan or credit application to an insured bank (e.g., willful over-valuing of land, property, securities or other assets or understatement of liabilities). Such statements or misrepresentations must have been capable of influencing the bank's credit decision. Actual damage or reliance on such information is not an essential element of the offense. The statute applies to credit renewals, continuations, extensions or deferments and includes willful omissions as well as affirmative false statements. Obsolete information in the original loan application is not covered unless the applicant reaffirms the information in connection with a renewal request. The application will trigger the statute even if the loan is not made.

18 U.S.C. Section 1029 - Fraud and Related Activity in Connection with Access Devices

This statute prohibits the production, use, and trafficking in counterfeit access devices (credit or debit cards), and the use of unauthorized access devices aggregating \$1,000 or more during a one-year period knowingly and with intent to defraud. The U.S. Secret Service is the appropriate investigative agency.

18 U.S.C. Section 1030 - Computer Fraud

This statute applies to persons who knowingly access a computer without authorization or who, having accessed a computer with authorization, use it for unauthorized purposes (e.g., obtaining information contained in records of financial institutions). Violations should be referred to the U.S. Secret Service.

18 U.S.C. Section 1341 - Mail Fraud

Covers use of the mails in furtherance of a fraudulent scheme. Commonly referred to as the "mail fraud statute," this law was used primarily in

check kiting cases before the passage of the general bank fraud provision in Section 1344. Valid mailings which can be used in an indictment include opening the account by mail, mailing of check order forms by the bank to the check printers during the period in which the scheme was being operated, and making deposits by mail. Use of the mails after a scheme to defraud has been completed is not an offense under this statute. Investigative jurisdiction rests with the U.S. Postal Inspection Service when bank employees are not involved or suspected.

18 U.S.C. Section 1343 - Wire Fraud

Applies to a scheme or an artifice to defraud or to obtain property or money through use of wire (telephone), radio or TV transmissions in interstate commerce. "Boiler room" operations and electronic funds transfer frauds are covered by this statute if the "wire" extends beyond the boundaries of one state.

18 U.S.C. Section 1344 - Bank Fraud

The bank fraud statute was modeled directly after the mail fraud statute (Section 1341). It covers the use of a scheme or artifice to defraud an insured bank or to obtain, through misrepresentations, any of the monies, funds, credits, assets, securities, or other property owned by, or under the control of, the institution. It clearly applies to check kites and would appear to apply when a financial institution's property is obtained under false pretenses, such as in advance fee scams and where fraudulent appraisals are used to obtain credit. Misrepresentation of the value of collateral or of third-party guarantees, misrepresented terms and conditions of participation loans, and other such devices may violate this statute. To convict, the prosecutor must show intent to defraud but it is not necessary that the scheme be successful or that anyone be actually defrauded by the scheme.

18 U.S.C. Sections 1951-1961 - Racketeer Influenced and Corrupt Organizations (RICO)

Commonly referred to as "RICO" (Racketeer Influenced and Corrupt Organizations) statutes. Covers investments in any enterprise affecting interstate commerce if the funds are derived from a "pattern of racketeering activity". These activities include murder, drug dealing, bribery, robbery, extortion, counterfeiting, mail fraud, embezzlement from pension funds, wire fraud,

obstruction of criminal investigations, and fraud in the sale of securities.

18 U.S.C. Section 1956 - Laundering of Monetary Instruments

Makes it illegal to conduct or attempt to conduct a financial transaction knowing that the property involved in the transaction represents the proceeds of some form of illegal activity. There must be intent to promote the carrying on of specified unlawful activity or knowledge that the transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of unlawful activity or to avoid a transaction reporting requirement under state or federal law.

The statute also makes it illegal to transport or attempt to transport internationally a monetary instrument or funds (1) with the intent to promote the carrying on of specified unlawful activity or (2) knowing that the monetary instrument or funds constitute the proceeds of some form of illegal activity and knowing that the transportation is designed in whole or part (a) to conceal the nature, location, source, ownership or control of the proceeds, or (b) to avoid a transaction reporting requirement under state or federal law.

18 U.S.C. Section 1957 - Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity

Makes it illegal to engage or attempt to engage in a monetary transaction in property constituting, or derived from, proceeds obtained from a criminal offense knowing that it is criminally derived property and has a value of over \$10,000.

18 U.S.C. Section 2113 - Bank Robbery and Incidental Crimes

In addition to covering theft of bank property by force or violence, this section also covers the entry or attempted entry of a bank with intent to commit any felony affecting any bank and in violation of any statute of the United States, or any larceny. Although this statute has seldom been used to prosecute bank fraud, it has been used successfully in a few major fraud cases. Potential penalties are much stiffer than traditional fraud statutes.

15 U.S.C. Section 78dd - Foreign Corrupt Practices Act of 1977

Covers payment of anything of value to any foreign official, foreign political party or candidate or any other person where an American corporation knows or has reason to know something of value was offered.

15 U.S.C. Sections 78ff and 78x - Securities laws

Covers criminal violations and penalties of securities laws.

31 U.S.C. Section 5311 - Currency Transactions/Bank Secrecy Act - Also 31 C.F.R. Part 103

Refer to the Financial Recordkeeping and Currency Transaction Regulations and the Bank Secrecy Act which are covered in the FDIC Manual for Compliance Examinations. Violations should be referred to the Internal Revenue Service - Criminal Investigation Division.

31 U.S.C. Section 5324 - Structuring Transactions to Evade Reporting Requirement

Makes it illegal to (1) cause or attempt to cause a domestic financial institution to fail to file a currency transaction report, (2) cause or attempt to cause a domestic financial institution to file a currency transaction report that contains a material omission or misstatement of fact, or (3) structure or assist in structuring, attempt to structure or attempt to assist in structuring, any transaction with one or more domestic financial institutions for the purpose of evading the reporting requirements.

Applies only to transactions occurring after January 27, 1987. Intent to evade the reporting requirements is an important element of the criminal offense. Carelessness or oversight would more likely trigger civil penalties. Applies to all persons including financial institutions and their employees. Violations should be referred to the Internal Revenue Service - Criminal Investigation Division.

Other Criminal Statutes

Briefly described below are other federal criminal statutes that may be relevant to a particular criminal referral:

18 U.S.C. Section 2 - Aiding and Abetting - Whoever aids, abets, counsels, commands, induces or procures the commission of a federal offense is punishable as a principal.

18 U.S.C. Section 4 - Misprision of Felony - Covers the failure to report a felony. Requires anyone who has knowledge of the actual commission of a felony cognizable by a United States court to report it to any judge or other person in civil or military authority.

18 U.S.C. Section 201 - Bribery of Public Officials - Proscribes the offering or soliciting of bribes to or by federal officials, elected representatives, jurors or witnesses in official proceedings with the intent to influence that person's official functions.

18 U.S.C. Section 371 - Conspiracy to Defraud - Covers a conspiracy of two or more persons to commit a federal offense or to defraud the United States or any agency thereof. This statute has been cited when two or more persons willfully ignored the notice requirements of the Change in Bank Control Act.

18 U.S.C. Section 1342 - Fictitious Name or Address - Covers the use of a false, assumed or fictitious name, address or title for the furtherance of a fraudulent scheme which is carried out by means of the postal service. Violations should be referred to the U.S. Postal Inspection Service except when bank employees are involved. In those cases, FBI should be notified.

18 U.S.C. Section 2314 - Transportation of Stolen Goods, Securities, etc. - Prohibits transportation of stolen goods, securities, moneys or falsely made, forged, altered or counterfeited securities in interstate commerce. Obtaining money from a bank on either a forged check of any amount or a fraudulently obtained check of \$5,000 or more, which is drawn on a bank in another state, comes under this section since it is transported in interstate commerce.

18 U.S.C. Section 2315 - Sale or Receipt of Stolen Goods, Securities, etc. - Prohibits receipt, concealment, storage, bartering or selling of stolen goods, securities, moneys, or fraudulent state tax stamps of \$5,000 or more. Prohibits the pledge or acceptance as security for a loan, any such stolen item, \$500 or more in value, moving

as foreign or interstate commerce.

2 U.S.C. 441b - Federal Election Campaign Act of 1971 - Prohibits national and insured state banks from making any contributions to or expenditures on behalf of any candidate for federal elective office. Insured state nonmember banks may make contributions to or expenditures on behalf of candidates or committees for state or local elective offices so long as the contribution or expenditure is consistent with state or local law. It should be noted that, even where permitted by state law, the policy statement entitled "Improper and Illegal Payments by Banks and Bank Holding Companies" requires the contribution or expenditure to satisfy requirements of safety and soundness. A loan is not a contribution if it is made in accordance with applicable banking laws and is made in the ordinary course of business (e.g., on appropriate terms and conditions and on a basis that assures repayment, 11 CFR ^ 100.7(b)(11)).

Improper and Illegal Payments by Banks

Refer to the FDIC Statement of Policy on Improper and Illegal Payments by Banks and Bank Holding Companies. This statement was designed to alert the banking community that certain payment practices disclosed by a few banks and bank holding companies may, in addition to their possible illegality, constitute unsafe or unsound banking practices. The principles enunciated in the policy statement essentially cover both the Foreign Corrupt Practices Act and the Federal Election Campaign Act.

IV. CRIMINAL REFERRALS

Part 353 of the FDIC Rules and Regulations requires insured nonmember banks to report, on a prescribed form, criminal violations of the United States Code that involve or affect the assets or the affairs of such banks to the appropriate investigating and prosecuting authorities, as well as to the FDIC. The primary purpose of the reporting requirement is to assure that the specific information needed by investigators and prosecutors for effective law enforcement is provided in an orderly and timely fashion. In addition, the ability of the FDIC to monitor and act to reduce losses of insured nonmember banks as a result of criminal activity

is enhanced by timely and accurate reporting. Instructions for preparing the report are contained on the form.

An Interagency Criminal Referral Form shall be filed in the following situations:

1. *An employee, officer, director, agent or other institution-affiliated party is suspected of committing or aiding in the commission of a crime involving the institution.*
2. *A known or suspected crime is committed against the institution, there is actual or potential loss to the institution of \$1,000 or more, and a possible suspect or group of suspects (not an employee, officer, director, agent, or institution-affiliated party) can be identified.*
3. *A known or suspected crime is committed against the institution, there is actual or potential loss to the institution of \$5,000 or more, and a potential suspect or group of suspects cannot be identified.*
4. *A financial transaction was conducted or attempted using the institution as a conduit for criminal activity. More specifically, the funds involved in the transaction were derived from illicit activity, the purpose of the transaction was to hide or disguise funds from illicit activities, or the purpose of the transaction was to evade the Bank Secrecy Act requirements.*

Reporting by Examiners

As a general rule, apparent criminal violations that are detected by examiners should be brought to the bank's attention for reporting by bank management in accordance with Part 353. However, under certain circumstances, it may not be wise or appropriate to notify bank officials; for example, senior bank officials are implicated in the suspected criminal activity or the examiner has reason to believe that a bank official or officials might flee, warn the target, destroy evidence or otherwise jeopardize an effective criminal investigation. In such cases, the examiner should complete a criminal referral report but must consult the regional office before informing the bank's board of directors or anyone associated with the bank of the apparent criminal violations.

Examiners also may be called upon to prepare criminal referrals where (1) the examiner suspects that a criminal statute has been violated but bank management disagrees and elects not to submit a Criminal Referral Form or where (2) the bank's referral has been prepared inadequately.

When confronted with any of the above circumstances and where losses attributable to the violation imperil the continued operation of the bank, the examiner must notify the regional office immediately.

Notifying the Bank's Board of Directors

With the concurrence of the Regional Office, the examiner should report the discovery of a significant apparent criminal violation directly to the bank's board of directors (or to the bank's executive committee or other appropriate representative of the board). In discussing the matter with the board, the examiner should present the facts giving rise to the apparent violation but avoid any conclusions as to the guilt or innocence of any particular individuals. The board should be apprised of the requirements of Part 353 to report the apparent violation promptly to law enforcement officials and to the Regional Director. While notification to bank officials of an apparent crime will be appropriate in most cases, the examiner should bear in mind the potential consequences of alerting bank officials to an impending criminal investigation in which senior bank officials may be involved.

Reporting Promptly to Law Enforcement Officials

Prompt reporting of apparent criminal violations to the FBI and U.S. Attorney is very important. Criminal Referral Forms should be completed, processed and forwarded to the U.S. Attorney as soon as possible. They should not be held until the examination is completed nor be delayed until the examination report is finalized in the regional office. If the apparent violation is significant and even a slight reporting delay is anticipated, the FBI and U.S. Attorney should be contacted by telephone to alert them of the potential violations.

Preparing and Filing the Interagency Criminal Referral Form

Under Part 353, bank management is primarily responsible for preparing the Interagency Criminal

Referral Form. This form requires information on the suspected violation(s), the suspect(s), any witness(es), and the individual(s) authorized to discuss the referral with authorities.

Information regarding the suspected violation is requested in two forms: brief statistical data and a detailed explanation. Statistical information is requested on items such as the date of the suspected violation, the dollar amount involved, a summary characterization of the suspected violation, and the amount of loss known prior to recovery. In the explanation of the suspected violation, a chronological and complete account of the violation, including what is unusual or irregular about the transaction, must be provided. A checklist is included in this section of the form to assist the filer in providing all pertinent information. It is critical that the explanation of the suspected violation be complete and understandable since Federal prosecutors do not have the resources to pursue all cases referred to them. If the seriousness and magnitude of the violation is clearly conveyed in this section of the form, the likelihood of prompt action by the appropriate agency will be enhanced.

Financial institutions are required to file the Criminal Referral Form within thirty days of detecting the criminal activity; however, if management is unable to identify a suspect within thirty days, reporting may be delayed an additional thirty days or until a suspect is identified, whichever is sooner. In no case shall the reporting of a known or suspected crime of an unidentified suspect exceed sixty days from the date of detection.

Management must notify its Board of Directors of any Criminal Referral Form filed in accordance with Part 353. In addition, the Board must record such notification in the minutes of the directors' meetings.

The original Criminal Referral Form and a copy of related supporting documentation must be filed with the U.S. Department of Treasury's Financial Crimes Enforcement Network (FinCEN). A copy of both the form and the related supporting documentation must be sent to the U.S. Attorney's Office, the FBI, and the FDIC. In addition, if known or suspected credit card or computer fraud is involved, an additional copy must be forwarded to the U.S. Secret Service. If known or suspected money laundering or violation of the Bank

Secrecy Act is involved, an additional copy must be forwarded to the IRS.

Although Part 353 does not specify a time limit for document retention, it is suggested that financial institutions retain a copy of the form and all original supporting documentation for ten years from the date of the form. This time period matches the statute of limitations for most banking crimes. However, financial institutions should maintain contact with the appropriate U.S. Attorney concerning any Criminal Referral Forms filed to determine the status of investigations; when it is determined that a case has been closed, financial institutions may request written permission from the U.S. Attorney to destroy the relevant records, provided this destruction does not violate other record retention statutes.

Right to Financial Privacy Act Exception for FDIC-Prepared Referrals

Nothing in the Right to Financial Privacy Act (RFPA) applies when customer financial records are transferred by the FDIC to the Department of Justice or FBI if (1) there is reason to believe that the records may be relevant to a violation of federal criminal law; and (2) the records were obtained in the exercise of the FDIC's supervisory or regulatory functions. This means that information obtained by the Division of Supervision in the ordinary course of its bank examination function and information that comes into the possession of the FDIC in the ordinary course of its receivership and liquidation functions can be transferred to Justice and the FBI without a subpoena if an FDIC official certifies to points (1) and (2) above. Normally, the certification will be included in the cover letter transmitting the criminal referral to the U.S. Attorney.

Right to Financial Privacy Act Restrictions on Bank-Prepared Referrals

The RFPA restricts banks from transferring some types of customer financial information that may be pertinent to a criminal referral. Generally, copies of customer financial records such as account statements, personal checks or loan documents pertaining to individuals cannot be included with the referral report unless the individual is notified of the transfer. However, records of insiders and major borrowers in

collusion with insiders are exempt from RFPA restrictions and may be included with the referral without notifying the customer. The referral form checklist directs the institution to indicate in the explanation of the suspected violation whether any information has been excluded from the referral and, if so, the reason why. The examiner should advise the bank official to clearly identify such documents in this section of the report and state that they have been withheld as a result of RFPA restrictions. This will put the U.S. Attorney on notice that pertinent customer records exist and can be obtained with a federal grand jury subpoena. Disclosures made by the bank in response to a federal grand jury subpoena are exempt from RFPA restrictions.

The RFPA covers only a narrow class of records -- those pertaining to individuals and partnerships of five or fewer partners. Many types of records that may support an apparent crime are entirely outside the scope of the RFPA and can be included with the referral. Records belonging to the bank, not to a customer, such as teller sheets, vault records, general ledger accounts, investment records, cashier's checks and so on; corporate records and records of partnerships of more than five partners, and records of bank insiders and major borrowers if believed to be acting in concert with an insider can be included with the referral without triggering the RFPA.

V. EXAMINER ASSISTANCE TO FEDERAL LAW ENFORCEMENT AUTHORITIES

Examiners may be requested to provide expertise to aid law enforcement agents in investigating and prosecuting a criminal case--usually in connection with bank fraud cases referred by the FDIC and in money laundering cases initiated by the IRS or law enforcement task forces. The assistance is most often needed for the following reasons:

1. To interpret documents subpoenaed from the bank;
2. To explain how the documents flow through the system;
3. To determine whether they are relied upon at some point by FDIC examiners, bank auditors or managers to formulate business

decisions or opinions as to the condition of the bank; or

4. To provide information concerning banking policies and banking practices in general.

At other times, more specific assistance is desired; this may include testimony at trial or before a federal grand jury.

Division of Supervision personnel will cooperate to the fullest extent possible in honoring reasonable requests for assistance. The regional office will supply the examiner with specific guidance governing each assignment. A written agreement may be necessary for long-term assignments. The following broad guidelines apply to most requests for examiner assistance.

1. The request for assistance must be for a legitimate law enforcement purpose within the jurisdiction of the requesting agency;
2. The information requested, or that which the examiner has been asked to review, must be relevant to a legitimate law enforcement inquiry;
3. The suspected criminal conduct should involve an FDIC insured bank, its directors, officers, employees, agents or customers;
4. In cases where the bank itself is not under investigation, the targets of the investigation should be specified and should be associated with the bank as directors, officers, employees, agents or customers;
5. Compliance with all applicable provisions of the Right to Financial Privacy Act covering disclosures of information derived from bank customer records must be assured;
6. The examiner should be instructed that while assisting the law enforcement authorities, he or she will be acting solely as a representative of the law enforcement authority and will not represent the FDIC in any way and should not assert nor exercise any authority as an FDIC examiner; and
7. If the examiner accompanies law enforcement agents onto the bank's premises for the purpose of gathering records, bank management must be apprised

that the examiner is assisting the law enforcement authority in a criminal investigation and does not represent the FDIC in any supervisory or regulatory capacity.

VI. FEDERAL GRAND JURY SUBPOENAS

A federal grand jury subpoena is an important investigatory tool used by government attorneys to build the prosecution's case without compromising the privacy of investigation targets or prematurely revealing their investigatory directions. Rule 6(e) of the Federal Rules of Criminal Procedure requires that grand jury proceedings are to be kept secret to the fullest extent practicable. Grand jury secrecy is maintained principally:

1. To encourage witnesses to come forward and to testify freely and confidentially;
2. To minimize the risks that prospective defendants will flee or use corrupt means to thwart investigations and escape punishment;
3. To safeguard the grand jurors themselves and the proceedings from extraneous pressures and influences;
4. To avoid unnecessary disclosures that may make persons appear to be guilty of misconduct without their being afforded adequate opportunity to challenge the allegations; and
5. To prevent information adduced under compulsion and for purposes of public justice from being used for insubstantial purposes, such as gossip, to the detriment of the criminal justice system.

Grand jury subpoenas should be addressed to the Regional Director or Regional Counsel who will then authorize the examiner to comply. The examiner may be directed to contact the prosecutor or investigator either before or after a grand jury subpoena is issued to assist in identifying and gathering the documents that are pertinent to the investigation. The Regional Counsel or attorneys from the Legal Division in Washington will provide authorization and

counsel to any examiner who testifies in a criminal or civil trial.

VII. SAFEGUARDING AND DOCUMENTING EVIDENCE

Where practical, copies of the most important evidentiary documents should be submitted with the Criminal Referral Form. In most cases where the alleged offender is no longer with the bank and no collusion with other employees is suspected, photocopying of other supporting, evidentiary documents will not be necessary. However, if the examiner believes evidence may be destroyed or otherwise become unavailable, the records must be duplicated during the examination. It is also important to photocopy evidence to be used to support a removal action under Section 8(e) of Federal Deposit Insurance Act. The copies should be initialed and dated by the examiner in case the originals are misplaced or destroyed.

In addition to photocopying documents, the examiner should document the flow of funds, approvals and employees responsible for handling each transaction. Flow charts and link diagrams are appropriate for documenting complex transactions. Listed below are questions typical of those which the examiner should consider:

1. What is the bank's policy for handling this type of transaction?
2. Is it a safe policy?
3. Was there deviation from the policy?
4. Who handled this transaction?
5. Who had knowledge?
6. Who benefited ultimately from the transaction?
7. What knowledge did the bank's directors have?
8. What was the credit quality at the time of making a loan and what it is now?

9. Was the documentation adequate at inception?

10. Was collateral value adequate at inception?

11. Are there presently any credit or legal problems?

The above questions are intended to guide the examiner in deciding how to best document a particular transaction. Once the transaction is properly documented, the copies should be segregated and maintained in the field office files.

VIII. NOTIFICATION TO THE BONDING COMPANY

The FDIC has a mutual interest with management of each insured bank to be certain that all of a bank's employees are protected by a fidelity bond. When a bank files a criminal referral on an employee, it normally will be required to notify its fidelity insurer. This notification is usually required by the terms of the insurance contract and is not dependent upon the filing of a claim against the insurance coverage. The standard financial institutions bond contains a termination clause which automatically cancels coverage of any employee as soon as there is knowledge of any dishonest or fraudulent act on the part of such employee. The insurer need not give notice of such termination, in fact, the decision of the insurer may be made at a subsequent date. In the rare case where a bank official has knowledge of a dishonest act on the part of an employee and yet the bank wishes to continue to employ that person, it is very important for the bank to obtain either an assurance in writing from the home office (agents generally are not so empowered) of the insurer that such person is still covered under the bond, or a new bond covering that person. Also refer to the Fidelity and Other Indemnity Protection Section of the Manual.

IX. OTHER MATTERS OF IMPORTANCE

It is essential that examiners remain alert for irregular or unusual activity, and explanations by bank officers which appear unreasonable should not be accepted without being fully investigated.

The examiner is concerned not only with internal crimes but also fraudulent schemes by outsiders. It should be remembered that early detection of a criminal act will reduce the potential for loss.

Examiners occasionally receive information about alleged misconduct by a bank, its officers, employees or directors and are requested to protect the informant's identity. When this happens, the examiner should advise the informant that the FDIC will try to protect the identity of the informant. However, prior to receiving the information, the examiner should advise the informant of the following facts:

1. Mere inquiry into the situation may cause bank employees to deduce the informant's identity.
2. The information may be referred to another agency, such as the Department of Justice, which may request the informant's identity to continue or complete an investigation.
3. If the information becomes the basis for a criminal prosecution, the court may order disclosure of the informant's identity to the defendant.